

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ERIC C. HSU et al.,

Plaintiffs and Appellants,

v.

SEMICONDUCTOR SYSTEMS, INC.

et al.,

Defendants and Appellants.

A097708, A097974, A098305

(Alameda County
Super. Ct. No. H-1931194)

Employee shareholders of a closely-held corporation transferred ownership of the shares of a former employee to themselves just before a merger that significantly increased the value of the corporate shares. The acquiring shareholders claimed they “purchased” the shares pursuant to an employee shareholder agreement entitling them to acquisition at book value. A jury found that any right to purchase shares at book value pursuant to the agreement was either held by the corporation alone, not the shareholders, or had elapsed before the alleged right was exercised.

The jury awarded the former employee \$2.4 million in compensatory damages upon concluding that no contractual right to purchase the shares had existed, and that the transfer of shares occurred with nondisclosure of the pending merger. The jury returned a verdict finding breach of contract, intentional interference with prospective economic advantage, conversion, and violations of the California Corporations Code. Additionally, a bench trial following the jury’s verdict determined that the corporation’s management

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III. A., B., C., D., and F.

breached their fiduciary duty by withholding information from the former employee who had remained a corporate shareholder. In addition to the compensatory damages award, the court awarded the former employee over \$2 million in costs and attorney fees.

This appeal followed, along with a cross-appeal by the prevailing former employee who challenges an adverse summary adjudication of his punitive damages claim and seeks remand for trial on punitive damages alone. We reject most of the contentions on both the appeal and cross-appeal, and affirm the judgment except for modifications in the cost award and one statutory claim.

I. FACTS

A. *Corporate Formation.*

Defendant Semiconductor Systems, Inc. (SSI) built and sold equipment used in manufacturing computer semiconductor chips. SSI was formed in 1990 as an employee-owned, closely-held corporation. Plaintiff Eric C. Hsu was a founder, officer, director, and the largest shareholder of SSI, eventually holding 20 percent ownership.¹ Defendants Michael L. Parodi, Jr., Gerald E. Masterson, and Douglas K. Amis were also founders, officers, directors, and major shareholders (collectively, management defendants).² Hsu was SSI's vice president of sales and marketing; Parodi was initially vice president of engineering and succeeded to the post of president and chairman of the board of directors; Masterson was vice president of finance, chief financial officer (CFO), and secretary to the board; and Amis was vice president of human resources.

¹ Hsu's wife, Angie L. Hsu, consented to the stock purchase and is also a plaintiff. For convenience, Mr. Hsu alone is referred to as plaintiff because Ms. Hsu played no active role in the events at issue.

² SSI corporate shares were also held, in lesser amounts, by defendants Qui Van Nguyen, Michael E. Van De Ven, John Stephens, Louie C. Fredriksz, Richard T. Benventano, Steve G. Cruickshank, Richard K. Fey, Ronald L. Lindquist, and Melville H. Madden (collectively, nonmanagement defendants).

SSI was formed through a management buyout of an existing corporation. Management borrowed the purchase money and, in conjunction with that loan, Hsu pledged his SSI stock as security for repayment and delivered his share certificate to the lender. The security pledge agreement was also accompanied by a blank form assignment of all SSI shares Hsu might acquire, to be used by the lender if SSI defaulted on its loan. The pledge agreement provided that it would terminate upon repayment of the loan, and promised that the share certificate and stock assignment would then be returned to Hsu. The loan was repaid in less than two years, and the lender delivered the share certificates and stock assignments to SSI. However, SSI did not forward those share certificates to Hsu or the other shareholders, but retained them.

B. Employee Stock Purchase and Shareholder Agreement.

Meanwhile, each of the shareholders had signed an “Employee Stock Purchase and Shareholder Agreement” (Agreement) upon formation of SSI that restricted disposition of shares.³ A shareholder could not sell his or her shares without first giving SSI an opportunity to purchase the shares itself or, failing such an election, giving the other shareholders an opportunity to purchase the shares. There is also a purchase right if the employee-shareholder leaves the company, although whether that right inures to the benefit of SSI alone, or to shareholders as well, is a point of contention. It is clear, however, that any right to purchase shares of a departing employee is a right, not an obligation. If the purchase right under the Agreement is not exercised, the departing employee may keep the shares.

The right to purchase is also strictly limited in time and commences upon “the cessation of [the share] Purchaser’s employment.” The corporation’s right to purchase a departing employee’s shares must be exercised within 60 days of cessation of employment or within 45 days after the corporation’s receipt of the departing shareholder’s written notice of cessation of employment, whichever is later. Assuming

³ The Agreement contains different provisions for vested and unvested shares, but vested shares alone are at issue here.

the shareholders have a right to purchase a departing employee's shares if the corporation does not opt to purchase, then the corporation has seven days after termination of its option to buy to notify the shareholders of the availability of the shares and the shareholders have seven days from their receipt of notice to elect a purchase. Shares purchased from a departing employee are bought at book value (the employee-shareholder's portion of undistributed corporate profits).

C. Hsu's departure from SSI.

Hsu left SSI in the summer of 1995. The exact date of Hsu's cessation of employment, which triggered the time-restricted right to buy Hsu's shares, is disputed. Defendants maintain that Hsu's cessation of employment coincided with his August 24, 1995 notice of resignation. Plaintiff Hsu maintains that his cessation of employment occurred when he left the company on July 28, 1995 for a so-called "leave of absence" that was, in reality, a termination.

At trial, Hsu testified that he was offered an executive position at KLA Instruments Corporation (KLA) in Taiwan, and advised Parodi and Amis, SSI's president and vice president of human resources, of his decision to accept the position over lunch on June 29, 1995. Hsu told the SSI executives that he would like to take a leave of absence, rather than to resign immediately, to blunt the impact of his departure for the company's benefit. Hsu also wanted leisure time with his family before relocating to Taiwan. However, Hsu testified at trial that he clearly told the SSI executives that he would not return to SSI after his leave of absence. Amis's journal entry for June 29, 1995 is corroborative, though more equivocal than Hsu's testimony. Amis wrote that Hsu informed SSI that Hsu "wants to take a L.O.A. and probably will not return to the company." Parodi conceded at trial that SSI management's expectation was that Hsu "would not return from the leave of absence."

The testimony of Hsu and Parodi is consistent in establishing that Parodi asked Hsu not to announce his leave of absence until after an important industry conference in mid-July 1995. Hsu agreed to limit his announcement to a few people, and told only CFO Masterson, certain SSI sales personnel, and a couple customer contacts before the

July 1995 conference. One of those SSI sales personnel, defendant Fey, corroborated the fact that Hsu announced to some members of the SSI sales staff before the July 1995 conference that Hsu was “leaving the company.” Fey understood that Hsu “would not be returning as an employee.”

Hsu testified that he made a general announcement to his sales and marketing department on July 13, 1995, the last day of the industry conference, that he was taking a leave of absence, at the completion of which he would not return to SSI but would instead work at KLA. Hsu completed a form request for leave of absence covering the period from July 28, 1995 to September 30, 1995, using dates Hsu said SSI’s Amis told him to use. Hsu testified that he told SSI’s human resources department, when completing the form, that he was taking a month’s leave of absence and then would start work at KLA. Hsu’s salary and medical insurance were terminated at the start of his leave of absence.

Hsu physically left SSI on Friday, July 28, 1995. Hsu testified that he packed and removed his personal belongings and returned his security badge. Hsu had planned to start work at KLA in September, after time off from work, but instead started at KLA on the following Monday, July 31, 1995. Hsu initially worked for KLA in the San Francisco Bay Area, and then split time between California and Taiwan.

The journal entries of SSI management following Hsu’s physical departure indicate that management understood that Eric Hsu was not returning. Amis, the vice president of human resources, may have begun efforts to replace Hsu as vice president of sales and marketing. Amis’s journal entry on his task list for August 17, 1995 states: “Search of VP sales.” On that same day, CFO Masterson’s task list includes the notation: “Get Eric off Records.”

On August 24, 1995, Hsu faxed notice of resignation to SSI’s management, Parodi, Masterson, and Amis. Hsu wrote: “This memo is to inform you regarding my resignation, from the position of Vice President of Sales and Marketing at Semiconductor Systems Inc. start this date.” Hsu testified that he sent the letter because he had told SSI that he was taking a month’s leave of absence beginning July 28, 1995, and was writing

about a month later “to have closure.” SSI replied to Hsu on August 24, 1995, accepting his resignation “effective this date.”

D. Failed negotiations to purchase Hsu’s SSI corporate shares.

When Hsu provided his notice of resignation on August 24, 1995, he also wrote to SSI management saying that he wanted to sell his SSI stock back to the company and requesting corporate financial documents to assess any purchase proposal. Hsu was not aware of any purchase rights under the Agreement. Hsu testified that SSI had previously purchased shares of departing employee-shareholders at what Hsu believed were freely negotiated prices. Hsu intended to keep his shares if he and SSI could not agree on a price.

SSI initially expressed no interest in purchasing Hsu’s stock, and told him he should keep his shares. However, SSI agreed to get back to Hsu with a proposal, and did so on September 28, 1995. SSI’s proposal did not invoke the Agreement, and offered a price below the Agreement’s formula book value. SSI represented the book value of Hsu’s shares at \$1.86 million, and offered a maximum of \$750,000 based on a liquidation value. As of this time, SSI had not made any mention of the Agreement, or its provisions for purchasing a departing employee-shareholder’s stock.

In October 1995, Hsu told SSI’s CFO Masterson that Hsu could not accept the proposal without supporting financial documentation as to the value of the shares, which Masterson agreed to provide. Hsu also told Masterson that Hsu intended to seek outside advice on valuing his shares. Shortly after Hsu’s conversation with Masterson, SSI increased its offer to \$1.8 million on October 27, 1995. In SSI’s written offer, Masterson said he calculated the figure under the Agreement’s “purchase price formula,” but the amount would have to be paid over four years and payment was subject to approval by SSI’s bank. This was SSI’s first mention of the Agreement since Hsu’s departure from the company.

Hsu and Masterson both testified that SSI was not attempting to invoke its rights under the Agreement at this time and that the parties were continuing their negotiations outside the Agreement. In fact, Masterson conceded at trial that any right that SSI had to

purchase Hsu's shares under the Agreement had lapsed. SSI's right under the Agreement to buy Hsu's shares expired by October 23, 1995, at the latest, even assuming that Hsu ceased employment upon his written resignation on August 24, 1995, and not the earlier date of the designated leave of absence. Hsu did not accept SSI's October 27, 1995 offer, and continued to insist on reviewing the company's financial documents.

E. SSI negotiates a merger with another company.

Meanwhile, SSI was exploring various financing alternatives to sustain growth. In late September 1995, FSI International, Inc. (FSI) expressed interest in the possibility of a financial transaction with SSI. On October 10, 1995, SSI hired an investment banking firm to evaluate its financing alternatives. FSI executives toured SSI facilities, and SSI and FSI signed a nondisclosure agreement for sharing corporate information, on November 1, 1995. SSI management (Parodi, Masterson, and Amis) toured FSI facilities on November 16 and 17, 1995, as discussions continued. The possibility of a merger was under consideration by November 1995. Draft merger agreements were circulated between SSI and FSI beginning in mid-December 1995, and SSI approved the merger on February 4, 1996. The merger agreement was signed February 5, 1996, and the transaction closed in April 1996. SSI shareholders realized a multi-million dollar profit.

F. SSI shareholders acquire Hsu's shares.

Parodi, Masterson, and Amis of SSI did not disclose to Hsu their discussions with FSI leading to the merger. In late October 1995, after FSI expressed an interest in discussing financial arrangements with SSI, SSI took a different approach in dealing with Hsu. Previously, SSI had proposed purchasing Hsu's shares outside the Agreement, at negotiated terms.

SSI now tried for a shareholder purchase under the Agreement. On October 30, 1995, SSI notified its shareholders (except Hsu) that limitations imposed by the company's bank could restrict SSI from purchasing Hsu's shares, and offered the shareholders an opportunity to buy Hsu's shares at book value. Parodi and Masterson informed the shareholders that SSI was investigating financial partnerships, and that investment representatives valued the company higher than its book value. In fact,

written materials provided to the shareholders went so far as to say that the market value of Hsu's shares "far exceeds" the book value, and that a merger or other event "leading to at least partial liquidity" could occur in the next 12 months.

The shareholders were asked to make their purchase elections by November 3, 1995. The shareholders returned elections to purchase Hsu's shares dated between October 30 and November 3, 1995. Assuming the shareholders had a right to purchase a departing employee's shares (a disputed point), elections through November 3, 1995 would be timely only if Hsu ceased employment upon his written resignation on August 24, 1995, and not the earlier date of the designated leave of absence.

Masterson of SSI wrote to Hsu on November 3, 1995, stating that the shareholders were exercising their purported right under the Agreement to purchase Hsu's shares at book value, which Masterson said was \$1.8 million—the same price offered by Masterson in his October 27, 1995 letter. Masterson asked Hsu to specify his payment instructions, and indicated a desire to close the transaction by November 20, 1995. Hsu telephoned Masterson on November 14, 1995, and again the next day, and advised Masterson that Hsu was still awaiting financial documentation supporting Masterson's proposal. Masterson did not mention his recent invocation of the Agreement, and Hsu believed discussions were still open as to the sale of his shares. Masterson and Hsu agreed to discuss the matter further by telephone on November 21, 1995. Instead of a telephone call continuing discussions, Masterson sent a letter to Hsu on November 21, 1995, stating that SSI shareholders were exercising their right to purchase Hsu's shares under the Agreement, and enclosing an SSI company check for \$1,803,847. The letter was delivered on the same day that SSI delivered a "term sheet" to FSI proposing a merger valued at \$57 million.

Hsu did not believe that there was any difference between SSI's October 27, 1995 offer and the shareholders' November 1995 stated elections to buy. Hsu thought he was still negotiating with the company through Masterson. Before receiving SSI's latest letter and check, Hsu replied to SSI on November 22, 1995, that he was agreeable to SSI's October 1995 proposal to use book value in valuing the stock but said he wanted an audit

to ascertain that value. Upon receiving SSI's check, Hsu immediately objected that no agreement had been reached to sell his shares. Hsu said that Masterson's letter and check were "invalid." Hsu did not cash the check.

After tendering the check to Hsu, SSI transferred ownership of Hsu's shares to the remaining shareholders over Hsu's prior objection without his knowledge. Under the Agreement, any transfer between shareholders was supposed to be accomplished by the departing employee's voluntary acceptance of the formula purchase price and delivery of his or her share certificates. Rather than obtaining Hsu's endorsement of his stock certificate as required by the Agreement, SSI used a blank form stock assignment signed by Hsu in a previous, unrelated transaction. As noted earlier, Hsu had pledged his SSI stock as security for repayment of a loan at the time of SSI's corporate formation. The security pledge agreement was accompanied by a blank form assignment of all SSI shares Hsu might acquire, to be used by the lender if SSI defaulted on its loan. The pledge agreement terminated years earlier upon repayment of the loan, and the stock assignment should have been returned to Hsu but was retained by SSI. It was that stock assignment document, executed by Hsu for the distinct purpose of securing a loan, that SSI used to transfer ownership of Hsu's shares to the remaining shareholders.

SSI never told Hsu that it had transferred ownership of his shares to the other shareholders. On December 21, 1995, SSI wrote to Hsu agreeing to an audit and consideration of a price adjustment of its \$1.8 million book value calculation, but without indicating that the shares had already been transferred. Hsu told SSI that he would not accept their proffered check for the purchase of his shares until the audit was complete. The audit was being arranged when, in February 1996, SSI publicly announced a merger with FSI. Hsu testified at trial that no agreement to sell his shares had ever been reached.

II. TRIAL PROCEEDINGS

Hsu sued SSI and the individual defendant shareholders in October 1996 for breach of contract, breach of fiduciary duty, violation of the California Corporations

Code, and related claims. On cross-motions for summary adjudication on multiple issues in November 1998, the court found that defendants' reliance upon the advice of counsel negated plaintiff Hsu's punitive damages claim.

Jury trial commenced in September 2000. In October 2000, the jury returned a verdict in plaintiff Hsu's favor on all submitted claims: breach of contract, intentional interference with prospective economic advantage, conversion, and Corporations Code violations. The jury found that defendant SSI breached the Agreement either because the individual shareholder defendants had no right to purchase Hsu's shares or because the shareholders' right to purchase had expired before the elections to buy were submitted. The jury also found that the management defendants (Parodi, Masterson, and Amis) intentionally interfered with Hsu's prospective economic advantage, and that all defendants wrongfully converted Hsu's shares. Finally, the jury found SSI and the management defendants liable for buying stock through means of negligent misrepresentation in violation of Corporations Code section 25401, among other Corporations Code violations by SSI and certain management defendants. The jury assessed damages for the contract and torts claims at \$2.418 million, plus an additional sum later struck by the trial court for intentional interference with prospective economic advantage. The damages award appears founded upon the testimony of plaintiff Hsu's damages expert that the merger value of Hsu's shares was \$4.218 million and he received only \$1.8 million, for a difference of \$2.418 million.⁴

In January 2001, the court held a bench trial on Hsu's equitable claims. After a tentative statement of decision and objections, the court issued its final statement of decision in November 2001. The court concluded that the management defendants (Parodi, Masterson, and Amis) breached fiduciary duties owed Hsu as a shareholder.

The court found that Hsu ceased employment with SSI on July 28, 1995, the date he started his purported leave of absence, but remained a shareholder until November 22,

⁴ The parties stipulated that Hsu eventually cashed SSI's tendered and refused \$1.8 million check, without waiving his objections.

1995, when SSI unilaterally transferred ownership of Hsu's shares. The court found that any right vested in the shareholders to buy Hsu's shares lapsed before the elections to buy were made. The management defendants' transfer of Hsu's shares in violation of the Agreement, and their failure to disclose material information to Hsu, breached fiduciary duties owed Hsu as a shareholder.

In January 2002, posttrial motions for a new trial or judgment notwithstanding the verdict were denied, with the exception of an adjustment to the damages awarded for intentional interference with prospective economic advantage noted earlier. An amended and final judgment was entered on March 8, 2002. In addition to the \$2.418 million compensatory damages award, the court also awarded Hsu over \$1 million in prejudgment interest and approximately \$2.3 million in costs and attorney fees. The parties timely appealed.

III. DISCUSSION

A. Breach of Contract and Breach of Fiduciary Duty.

The jury found that defendant SSI's transfer of plaintiff Hsu's shares to the remaining shareholders breached its shareholder Agreement with plaintiff Hsu either because the remaining shareholders had no right to purchase Hsu's shares under the Agreement, or because the time to exercise any right to purchase expired before the elections were made. In holding the management defendants liable for breach of fiduciary duty, the trial court similarly found that the transfer of Hsu's shares violated the Agreement. The court concluded that any right vested in the shareholders to buy Hsu's shares lapsed before the elections to buy were made. The management defendants thus breached their fiduciary duty by participating in the unauthorized transfer of Hsu's shares.

1. Substantial evidence supports the finding that Hsu ceased employment on July 28, 1995, the date of his so-called “leave of absence.”

As described in detail above, the right to purchase a departing shareholder-employee’s shares under the Agreement is strictly limited in time and commences upon “the cessation of [the share] Purchaser’s employment.” The date of Hsu’s cessation of employment, triggering the time-restricted right to buy Hsu’s shares, was disputed at trial. Defendants maintained that Hsu’s cessation of employment coincided with his August 24, 1995 notice of resignation. Plaintiff Hsu maintained that his cessation of employment occurred when he left the company on July 28, 1995, for a “leave of absence” that was actually the end of his employment at SSI.

The date of Hsu’s cessation of employment is critical. Any shareholder right to purchase Hsu’s shares had to be exercised within 74 days of Hsu’s cessation of employment. The shareholders returned elections to purchase Hsu’s shares dated between October 30 and November 3, 1995. Elections made on those dates would be timely only if Hsu ceased employment upon his written resignation on August 24, 1995, and not the earlier date of the designated leave of absence.⁵

On appeal, defendants argue that the date of Hsu’s cessation of employment is a question of law, and the proper answer to the question is that Hsu ceased employment upon his formal resignation. As Hsu rightly observes, defendants’ argument is an attempt to recast a factual question into a legal one. There was never any dispute as to the legal significance of the term cessation of employment. The question at trial was whether Hsu’s employment ceased at the time of his so-called leave of absence, or at the time of his later written notice of resignation. This question is a factual one, resolved by judge and jury in Hsu’s favor.

⁵ Plaintiff Hsu argues that the elections to buy are falsely dated and were not actually submitted until after November 6, 1995, and were thus untimely even if Hsu’s notice of resignation is the operative date. We need not address this alternative ground for sustaining the breach of contract finding.

While the evidence as to the date of Hsu's cessation of employment was sharply disputed, there is substantial evidence supporting the fact finders' determinations. In reviewing whether a judgment is supported by substantial evidence, "we consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in favor of the judgment. We do not reweigh the evidence. 'Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment.' " (*McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 1282, italics in original.)

Here, Hsu testified that he physically left SSI on July 28, 1995, with a clear understanding between himself and SSI that Hsu would not return as an employee. His so-called "leave of absence" was never intended by the parties as a true leave of absence in which the employment relationship would have been suspended, rather than terminated. His departure was initially called a leave of absence for the company's benefit, according to Hsu, to lessen the impact of the loss of a key executive. That Hsu's departure would have an adverse impact on the company's standing was corroborated by defendant Parodi, SSI's president, who admitted that Parodi asked Hsu not to announce his leave of absence until after an industry conference in mid-July 1995.

Another defendant, Fey, further corroborated Hsu's testimony that Hsu told SSI that he would not return after his designated leave of absence. Fey testified that Hsu announced to SSI salespersons before that July 1995 conference that Hsu was "leaving the company." Fey understood that Hsu "would not be returning as an employee."

Additional evidence of Hsu's termination of employment in July 1995 is the fact that his salary and medical insurance were terminated at that time. Also, the journal entries of SSI management following Hsu's physical departure and before his notice of resignation suggest that SSI understood that Eric Hsu was not returning from his "leave of absence." Amis, the vice president of human resources, seems to have begun efforts to replace Hsu as vice president of sales and marketing. Amis's journal entry on his task list

for August 17, 1995 states: “Search of VP sales.” On that same day, CFO Masterson’s task list includes the notation: “Get Eric off Records.”

There is contradictory evidence, the strongest of which is Hsu’s own August 24, 1995 memorandum of resignation: “This memo is to inform you regarding my resignation, from the position of Vice President of Sales and Marketing at Semiconductor Systems Inc. *start this date.*” (Italics added.) SSI replied to Hsu on August 24, 1995, accepting his resignation “effective this date.” However, it is not our place to reweigh the evidence. “ ‘Our authority begins and ends with a determination as to whether, on the entire record, there is any substantial evidence, *contradicted or uncontradicted*, in support of the judgment.’ ” (*McMahon v. Albany Unified School Dist.*, *supra*, 104 Cal.App.4th at p. 1282, italics altered.)

The finding by judge and jury that SSI breached the Agreement by transferring Hsu’s shares to the remaining employee-shareholders is supported by substantial evidence. Liability was thus properly imposed upon SSI for breach of contract, and upon the management defendants for breach of fiduciary duty in participating in that unauthorized transfer of a shareholder’s stock. We need not address defendants’ challenge to the verdict’s other basis for finding breach of contract: that the corporate shareholders, as opposed to SSI itself, did not have a right to purchase Hsu’s vested shares under the Agreement. Even assuming such a right existed, the right expired before it was exercised.

2.. Resolution of factual inconsistencies was for the fact finder at trial.

Defendants argue that Hsu’s testimony that he ceased employment upon his so-called leave of absence on July 28, 1995, is not credible, or that at least we should disregard Hsu’s trial testimony to the extent that it is inconsistent with his deposition testimony. At trial, Hsu testified that he informed SSI executives over lunch on June 29, 1995, that his departure was for the purpose of taking a position at KLA. Hsu also said that he told others at SSI that he was taking a job with KLA before going on his leave of absence. Hsu was impeached at trial with his deposition testimony that he did not tell

anyone at SSI that he had accepted a position with KLA until his letter of resignation on August 24, 1995. Defendants also note that Hsu used the date that SSI accepted his resignation as the operative date under the Agreement when responding to a contention interrogatory posed three years before trial, and suggest that this evidence is conclusive.

Hsu's pretrial deposition testimony and interrogatory response are not conclusive. Factual inconsistencies are for the trier of fact to resolve, including inconsistencies in the testimony of a particular witness. (*Beck v. Weather-Vane Corp.* (1960) 185 Cal.App.2d 688, 693, disapproved on other grounds in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 287, fn. 3.) Defendants' observation that a party generally may not reverse prior testimony in opposing a motion for summary judgment is irrelevant to the situation here, where there was a trial. (*Thompson v. Williams* (1989) 211 Cal.App.3d 566, 573.) Interrogatory answers and deposition testimony are not conclusive at trial, but may be contradicted or explained. (*Mason v. Marriage & Family Center* (1991) 228 Cal.App.3d 537, 546; *Beck, supra*, at pp. 693-694; Weil & Brown, Cal. Practice Guide: Civil Procedure Before trial (The Rutter Group 1997) ¶ 8:1247.) Where trial and deposition testimony conflicts, it is for the trier of fact to "determine where the truth lies." (*Beck, supra*, at p. 694.)

3. Whether a "leave of absence" is a true suspension of the employment relationship, or a termination, is a matter for the fact finder at trial.

It is also not conclusive, contrary to defendants' assertions on appeal, that a "leave of absence" is commonly understood as a suspension, not a cessation, of employment. Defendants rely upon our observation in an unemployment compensation case that "a 'leave of absence,' taken by an employee, is not a termination of the employment: it preserves the employer-employee relationship in a state of suspense." (*Lewis v. Unemployment Ins. Appeals Bd.* (1976) 56 Cal.App.3d 729, 739.) However, we also observed that a change in an employment relationship may not be "a true 'leave of absence,' even if the parties call it one." (*Id.* at p. 741.) A genuine leave of absence is one in which the employer and employee "contemplate a continuity of the employment

status.” (*Id.* at p. 742.) Here, there was substantial evidence that Hsu and SSI did not contemplate a continuity of his employment status, but a termination.

Defendants argue that the Agreement is undermined if Hsu’s leave of absence is found to be a cessation of employment because such a finding compromises purchase rights and thus thwarts the Agreement’s objective of maintaining SSI as a closely-held corporation entitled to preferential tax treatment. The Agreement, however, safeguards against any uncertainty in applying the cessation of employment standard to a purported leave of absence. SSI may exercise its right to purchase a departing employee-shareholder’s stock within 60 days of cessation of employment, but such period shall in no event expire sooner than 45 days after SSI’s receipt of written notice of cessation of employment. Accordingly, there is no danger that purchase rights would lapse because SSI failed to comprehend that an employee’s so-called leave of absence was, in fact, a termination. Regardless of when the cessation of employment occurs, SSI has 45 days from *notice* of cessation of employment to exercise its purchase right. SSI, and its shareholders, failed to act within the periods of time commenced with Hsu’s cessation of employment *and* his notice of cessation of employment.

4. The special verdict form was not flawed in permitting a finding of breach of contract without specification of the exact act of breach.

Defendants criticize the special verdict form because it permitted the jury to find a breach of contract either because the shareholders had no right to buy Hsu’s shares, or because the time to exercise the right expired, without requiring juror unanimity as to precisely which of the two acts constituted the breach of contract. The verdict form was proper. As this court has previously found, “at least nine of twelve civil jurors must concur that each element of a cause of action has been proved by a preponderance of the evidence, but, faced with multiple or alternative acts which could support an element of a cause of action, nine jurors need not concur on which act is proved.” (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1486, citing *Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1486.) Here, polling of the jury established that 12 civil jurors found

that SSI breached the contract. The jurors were not required to concur on which of the two acts supporting that element was proved.

5. The trial court did not abuse its discretion in admitting evidence of indemnification.

In the February 1996 merger contract, SSI shareholders agreed to indemnify FSI for any claim arising out of transactions with former shareholders in the year predating the contract, and established an escrow fund with their corporate shares to secure the indemnification. Hsu was threatening litigation and the indemnification provision protected FSI from Hsu's claim that SSI and its shareholders had misappropriated his stock.

The trial court admitted evidence of the indemnification provision over defendants' objections that the evidence was irrelevant and unduly prejudicial. (Evid. Code, § 352.) The court found the fact of indemnification relevant to showing the interest and bias of the testifying defendant shareholders. Defendants renew on appeal their challenge to the admission of indemnification evidence.

We conclude that the indemnification evidence was relevant and sufficiently probative to outweigh any prejudice from its admission. "Evidence tending to show a witness has some motive, bias, or interest that might induce false testimony has long been a permissible form of impeachment." (*People v. Mickle* (1991) 54 Cal.3d 140, 168.) The individual defendants' agreement to be responsible for FSI's liability on "any claim, action, dispute or loss" by Hsu gave them a substantial interest in succeeding in the litigation.

Defendants argue that their interest in the litigation was manifest because they faced personal liability for a judgment against them, thus making the indemnification evidence cumulative at best. Defendants insist that the escrow and indemnity provisions did not give them any interest they did not have already. That assertion is disproved by the terms of the merger contract. Under the indemnification provision, each individual defendant faced financial loss if SSI or any shareholder were found culpable. The individual defendants indemnified FSI against claims or losses arising out of securities

transactions “made between or among [SSI] and/or its shareholders and former shareholders.” Each defendant thus had an interest in protecting SSI and the other individual defendants from liability, apart from his interest in protecting himself personally from an adverse judgment.

We are not dismissive of potential prejudice from the introduction of indemnification evidence. However, it is the province of the trial court to weigh the probative value of evidence against its potential undue prejudice. A trial court’s evidentiary rulings must be upheld unless the trial court abused its discretion by exceeding the bounds of reason. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.) No abuse of discretion is shown on this record.

6. Hsu did not waive his right to contest the timeliness of the shareholders’ election to buy his shares.

Defendant shareholders maintain that they tendered performance under the Agreement to Hsu by stating their election to buy his stock and delivering a check, and that Hsu waived objections as to the timeliness of that election by contesting the amount of the tender alone. Defendants say the trial court erred in refusing jury instructions on this waiver theory, and in rejecting the waiver defense in the bench trial on breach of fiduciary duty.

The trial court did not err. Defendants’ waiver theory is based upon a questionable characterization of the facts and a misapplication of legal principles. The tender of performance defendants rely upon is Masterson’s November 3, 1995 letter in which he states that the shareholders are exercising their right under the Agreement to purchase Hsu’s stock, and the subsequent November 22, 1995 delivery of a check for \$1.8 million. Contrary to defendants’ characterization of the evidence, Hsu’s objections to Masterson’s letter and check were not confined to the amount tendered. Upon receiving SSI’s check, Hsu immediately objected that no agreement had been reached to sell his shares and denounced Masterson’s documents as “invalid.” While Hsu did agree on a pricing formula to be used in an audit of SSI’s books, it is not clear from defendants’

citations to the record that the parties agreed to be bound by the results of that audit without further review and negotiation.

Even assuming that Hsu's only stated objection to the shareholders' tender of performance under the Agreement was to the price, Hsu did not waive his right to contest the shareholders' fundamental lack of any contractual right to demand his shares. Defendants rely upon waiver principles enunciated in two code sections, Code of Civil Procedure section 2076 (section 2076) and Civil Code section 1501 (section 1501). Section 2076 provides: "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards." Section 1501 similarly provides: "All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could then be obviated by him, are waived by the creditor, if not then stated."

These code sections must be read together, and section 1501 qualifies section 2076 by requiring a specification of objections to a defect in tender only to the extent that the defect can be obviated. (*Allen v. Chatfield* (1916) 172 Cal. 60, 69; *Sanguansak v. Myers* (1986) 178 Cal.App.3d 110, 115.) "The rationale of the requirement of specific objection is that the offeror should be permitted to remedy any defects in his tender; the offeree is therefore not allowed to remain silent at the time of the tender and later surprise the offeror with hidden objections." (*Riverside Fence Co. v. Novak* (1969) 273 Cal.App.2d 656, 662.) Sections 2076 and 1501 "are primarily intended to protect debtors/offerors who perform or tender performance in good faith from harm by creditors/offerees who refuse to accept or intentionally fail to demand proper tender." (*Sanguansak, supra*, at pp. 116-117.) Sections 2076 and 1501 do not create a contractual right where none exists, but simply prevent an offeree from evading contractual obligations by exploiting minor noncompliance in the offeror's mode of tender that was capable of correction.

An offeror's inability to perform according to the contract cannot be corrected and is not waived by the offeree's failure to specify an objection on that ground. (*Allen v. Chatfield, supra*, 172 Cal. at pp. 68-69; Civ. Code, § 1495.) Here, defendant shareholders were unable to perform because any right they had to buy Hsu's shares expired before they tendered performance. The shareholders could not have cured the defect in their tender, and thus Hsu was not required to advise them of that defect.

Defendants acknowledge that the waiver rules do not apply where the offeror is unable to perform, but argue that defendant shareholders were able to perform under the Agreement because they had \$1.8 million, and proffered the money to Hsu. The ability to perform, however, means more than financial liquidity. The ability to perform includes legal ability to perform. (*Allen v. Chatfield, supra*, 172 Cal. at pp. 68-69.) The offeror must be entitled to reciprocal performance upon the offeree's tender of performance. (See Civ. Code, § 1487 ["An offer of performance must be made by the debtor, or by some person on his behalf and with his assent."].) Were it otherwise, a third party outside SSI could demand that Hsu sell his shares upon the bare presentation of an amount equal to the shares' book value. The trial court properly rejected defendants' waiver defense.

7. The trial court's findings support imposition of liability upon the management defendants for breach of fiduciary duty.

In a bench trial following the first phase jury trial, the court concluded that the management defendants (Parodi, Masterson, and Amis) breached fiduciary duties owed Hsu as a shareholder. The court found that Hsu ceased employment with SSI on July 28, 1995, the date he started his purported leave of absence, but remained a shareholder until November 22, 1995, when SSI unilaterally transferred ownership of Hsu's shares. The court found that any right vested in the shareholders to buy Hsu's shares lapsed before the elections to buy were made. The management defendants' unilateral transfer of Hsu's shares in violation of the Agreement, and their failure to disclose material information concerning SSI, breached fiduciary duties owed Hsu as a shareholder.

Defendants contend that the trial court failed to make necessary findings in its statement of decision to support the imposition of liability for breach of fiduciary duty, and that the management defendants' transgressions amounted to no more than "breach of a procedural term in an ambiguous Shareholder Agreement" that were not tortious. The management defendants understate both the comprehensiveness of the court's statement of decision, and the culpability of their conduct.

The court's statement of decision adequately states the basis for its determination that the management defendants breached their fiduciary duties. The court found that the management defendants "breached their fiduciary duty to Mr. Hsu by participating in the transfer of all of Mr. Hsu's shares of SSI stock in violation of the Shareholder Agreement," and accomplished the transfer by wrongful means. The court observed that "Mr. Masterson never asked Mr. Hsu to transfer his shares as required by the Shareholder Agreement and never asked Mr. Hsu to sign over the transfer, but rather used a document that was never intended by any of the parties when the corporation was formed to be used in such a manner—the assignment separate from certificate . . .—to unilaterally transfer Mr. Hsu's shares, which happened to be in the custody of SSI in a fiduciary basis, to himself, to Mr. Amis, to Mr. Parodi, and to the other individual defendants without any notice to Mr. Hsu or any consent requested from Mr. Hsu or any disclosure to Mr. Hsu of

what had taken place.” The court further found that the management defendants breached their fiduciary duty “to disclose to Mr. Hsu relevant, material information concerning the corporation (SSI) prior to the time that they acquired Mr. Hsu’s shares.”

These findings sufficiently support the court’s determination that the management defendants breached their fiduciary duties. We find unpersuasive defendants’ argument that the court’s detailed recitation of the means by which Hsu’s shares were transferred supports the court’s damages assessment alone, and not liability. While the passage is located within a general discussion of damages, the finding is not confined to damages. Nor do we find any ambiguity in the court’s finding that the management defendants failed to disclose material information concerning SSI before acquiring Hsu’s shares in November 1995. The nature of the undisclosed information is plainly the merger discussions between SSI and FSI, and need not have been further identified as such.

Defendants seek to impose a burdensome level of specificity upon a trial court writing a statement of decision that goes beyond statutory requirements. (Code Civ. Proc., § 632.) A statement of decision need not include an express finding on every controverted fact and need not respond point by point to each issue posed by the parties. (*Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1379-1380.) “The court’s statement of decision is sufficient if it fairly discloses the court’s determination as to the ultimate facts and material issues in the case.” (*Golden Eagle Ins. Co., supra*, at p. 1380.)

The trial court plainly stated its finding that the management defendants breached their fiduciary duties, and that finding is supported by the record. As officers, directors, and majority shareholders, the management defendants had “a fiduciary responsibility to the minority [shareholders] and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority.” (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108.) The management defendants acknowledge the high standard of good faith required of

them but insist that their misconduct did not exceed “technical breaches” of the Shareholder Agreement common to all shareholders.

The record is to the contrary. The management defendants were in possession of material information about the proposed SSI/FSI merger, and failed to disclose that information to Hsu when negotiating with him for the purchase of his shares. The three management defendants personally engaged in discussions with FSI before acquiring Hsu’s shares in November 1995. In October 1995, the management defendants advised all shareholders, except Hsu, that SSI was pursuing “partnering possibilities” and that a merger or other event “leading to at least partial liquidity” could occur in the next 12 months. The management defendants encouraged the shareholders to buy Hsu’s shares at book value, which was far less than the market value of Hsu’s shares.

The management defendants’ method of accomplishing the acquisition of Hsu’s shares was also an abuse of their power to control corporate activities. Rather than obtaining Hsu’s endorsement of his stock certificate as required by the Agreement, defendant Masterson used a blank form stock assignment signed by Hsu in a previous, unrelated transaction. The stock assignment document, executed by Hsu for the distinct purpose of securing a loan years earlier, was used to transfer ownership of Hsu’s shares to the management defendants and other remaining shareholders. The management defendants then concealed the transfer from Hsu. Hsu met with Parodi, Masterson, and Amis in December 1995, after the transfer was accomplished, and yet the three men never told Hsu that they transferred ownership of his shares to themselves and the other shareholders.

Defendants argue that the use of the stock assignment form was sanctioned by SSI’s attorney, and thus excusable. The evidence relied upon is Masterson’s testimony that Attorney Michael Danaher of Wilson Sonsini told Masterson that the stock assignment could be used to transfer Hsu’s shares. However, further questioning of Masterson at trial established that it was Masterson who told Attorney Danaher that the stock assignment “was intended for use in connection with the shareholder agreement.” This vague generalization concealed the true purpose of the stock assignment. There is

no evidence that Attorney Danaher, with awareness of the true purpose of the stock assignment as security for a loan, recommended its use for the distinct purpose of acquiring Hsu's shares. Substantial evidence supports the trial court's finding that the management defendants breached their fiduciary duties.

B. Conversion and Intentional Interference with Prospective Economic Advantage.

The individual defendants contest the jury's verdict finding them liable for conversion and intentional interference with prospective economic advantage on the single point that if the breach of contract claim fails on appeal, so too should these tort claims predicated upon violation of the Agreement. Having sustained the jury's verdict of breach of contract, no issue remains on these tort claims.

C. Corporations Code Violations.

The jury found that SSI and the management defendants (Parodi, Masterson, and Amis) violated Corporations Code section 25401 (section 25401), and that these same defendants (with the exception of Amis) also violated Corporations Code sections 25400, subdivision (d) (section 25400(d)) and 25504.1 (section 25504.1). Defendants contend that these security fraud statutes do not apply to their acquisition of stock under a shareholders' agreement and, additionally, that SSI cannot be held liable under section 25401 because it did not itself purchase Hsu's shares. Only the latter contention has merit.

Section 25400(d) protects against securities fraud by forbidding "a broker-dealer or other person selling or offering for sale or purchasing or offering to purchase the security, to make, for the purpose of inducing the purchase or sale of such security by others, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or which omitted to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and which he knew or had reasonable ground to believe was so false or misleading."

Section 25401 is similar to a common law cause of action for negligent misrepresentation, and provides: “It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” Any person materially assisting in a violation of section 25401 with intent to deceive or defraud is jointly and severally liable for securities fraud. (§ 25504.1.)

Sections 25400(d) and 25401 differ from common law fraud causes of action in not requiring proof of reliance, and reflect the Legislature’s intent to ease a plaintiff’s burden of proving securities fraud. (*Bowden v. Robinson* (1977) 67 Cal.App.3d 705, 714-715.) Defendants concede that a plaintiff asserting violations of these statutes need not prove that he or she relied upon the defendants’ misrepresentations, but note that a plaintiff must still prove that the price received was affected by the misrepresentation. Our high court has cited, with approval, comments on this point by the principal drafters of section 25400(d): “ ‘There is no requirement under these sections that the plaintiff rely upon the statements or acts of the defendant or even that he be aware that the defendant made them or engaged in them. All that is required is that the plaintiff establish that the price which he paid or received was affected by the defendant’s conduct or statements, which would of course assume that someone acted on the basis of the defendant’s wrongful conduct. However, it is not necessary that the plaintiff prove that he personally was influenced by such conduct.’ ” (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1103.)

Defendants argue that the price Hsu received for his shares was not affected by the misrepresentations of SSI and the management defendants because the price was fixed by the Agreement. The misrepresentations did not “induce” the sale of Hsu’s shares within the meaning of section 25400(d), say defendants, nor was the sale completed by “means of” a misrepresentation within the meaning of sections 25401 and 25504.1. According to defendants, the mandatory nature of the securities transaction defeats Hsu’s ability to

establish that their misrepresentations affected the price he received or were otherwise material to the transaction.

There is ample authority, overlooked by the parties in their briefing, that misrepresentations in the acquisition of stock under a shareholders' agreement at a fixed price is not actionable under federal securities law which, like California law, requires materiality. (E.g. *Toledo Trust Co. v. Nye* (6th Cir. 1978) 588 F.2d 202, 206-209 [collecting cases]; *Blackett v. Clinton E. Frank, Inc.* (D.C. Ill. 1974) 379 F.Supp. 941, 947-948.) The reasoning of these cases is unimpeachable: misrepresentations cannot be material if the plaintiff is already contractually bound to sell his or her shares at an established price. (*Toledo Trust Co., supra*, at p. 206.)

However, there is a critical difference between those cases and this case. Here, Hsu was not contractually bound to sell his shares, as judge and jury found upon substantial evidence. Any right the shareholders had to purchase Hsu's stock under the Agreement lapsed before that right was exercised. "When a stockholder is bound to sell his stock by a *valid* option agreement, whatever he knew or did not know about the corporation is totally irrelevant to the decision to sell." (*Coons v. Kidder, Peabody & Co., Inc.* (C.D.N.Y. 1982) 539 F.Supp. 1145, 1147, italics added.) But misrepresentations are relevant if an option to buy is incorrectly exercised. (*Id.* at p. 1147, fn. 1.) Hsu was thus entitled to allege and prove that defendants' acquisition of Hsu's shares, while tendering a \$1.8 million purchase price and without informing Hsu of the FSI merger prospects, violated the Corporations Code.⁶

As to SSI's liability under section 25401, there is merit to defendants' argument that SSI did not itself buy Hsu's shares and thus is outside the scope of that statute. (*Admiralty Fund v. Jones* (9th Cir. 1982) 677 F.2d 1289, 1296; see *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1056 [drafters of § 25401

⁶ "Sale" is broadly defined in the Corporations Code to include "every contract of sale of, contract to sell, or *disposition of*, a security or interest in a security for value." (Corp. Code, § 25017, subd. (a), italics added.)

conclude that a violator is liable only to persons with whom he or she deals]; see also *Courtney v. Waring* (1987) 191 Cal.App.3d 1434, 1440 [noting drafters' conclusion that § 25401 applies only to the actual seller].) Accordingly, we will modify the judgment to strike the section 25401 violation against SSI. The modification has little practical effect, as SSI remains liable for the same amount of damages under section 25504.1 for materially assisting in the violation of section 25401.

D. Damages.

The jury awarded \$2.418 million in damages for both the breach of contract and conversion claims. Plaintiff Hsu's damages expert had testified to substantially the same figure, which the accounting expert arrived at by using the merger value of Hsu's shares. The accountant testified that the merger value of Hsu's shares was \$4.218 million and Hsu received only \$1.8 million, for a difference of \$2.418 million.⁷

Defendants contend that the jury's reliance upon the April 1996 merger value of Hsu's shares is misplaced, and overcompensates Hsu for his actual injury. Yet defendants do not dispute that the jury was properly instructed that it could consider factors before and after the November 22, 1995 date of breach and conversion. While defendants concede that the jury could consider the merger as an event after the breach relevant to determining damages, they maintain that the jury went too far in its wholesale adoption of the merger value. Defendants argue that a merger was not certain in November 1995, and the merger valuation eventually reached included a premium for total control of the company—a premium inapplicable to Hsu's "illiquid" 20 percent interest.

There is substantial evidence, however, of strong merger prospects in November 1995, when defendants wrongfully seized Hsu's shares. The evidence is uncontroverted

⁷ Plaintiff's damages expert used figures down to the dollar, which the jury apparently rounded out. Defendants do not challenge this minor difference in amounts. Also, we need not address plaintiff's conditional cross-appeal request for a broader measure of damages if this case is remanded, as no remand is warranted.

that a merger was under consideration at that time, and draft merger agreements were circulated just one month after the acquisition of Hsu's shares. SSI approved the merger in early February 1996, less than three months after taking Hsu's shares. Moreover, defendants' claim that the merger value is excessive is belied by SSI's own contemporaneous valuation. On November 22, 1995, the date of breach and conversion, SSI wrote to FSI proposing a merger for \$57 million, over twice the final merger value used by the jury. It also cannot be overlooked that Hsu was entitled to keep his shares absent a timely exercise of purchase rights under the Agreement, and would have received the merger value for his shares but for defendants' unlawful conduct. The jury's damages award is not excessive.

E. Costs.

The trial court awarded plaintiff Hsu \$136,824.98 in costs. The award includes \$69,466.08 for expert witness fees and general photocopying expenses, which defendants contend are not recoverable as costs. Defendants are correct. These two categories of expenses are "not allowable as costs, except when expressly authorized by law." (Code Civ. Proc., § 1033.5, subds. (b)(1) & (b)(3).)

Plaintiff argues that the expenses are expressly authorized by law because contractual fee and cost provisions are enforceable, and the parties' Agreement states that the prevailing party shall recover "all fees, costs and expenses." (Civ. Code, § 1717, subd. (a).) Plaintiff argues that the broadly worded contractual cost provision expands the scope of recoverable costs beyond those costs permitted by statute. Some courts have rejected this argument outright, holding that the Legislature's intention that Civil Code section 1717 be uniformly applied precludes litigants from adopting a definition of costs different from the statutory definition. (E.g. *Fairchild v. Park* (2001) 90 Cal.App.4th 919, 928-930.) Other courts have held that litigants may contractually define costs different from the statutory definition, although contractual costs provisions are presumed to adopt the statutory definition absent evidence to the contrary. (E.g. *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 491-492 (*Arntz*).) As

stated in *Arntz*, “an undefined general contractual provision entitling the prevailing party to ‘reasonable attorney’s fees and costs’ must be interpreted in light of Code of Civil Procedure section 1033.5’s limited definition of costs.” (*Id.* at p. 491.) Nevertheless, “[w]hile it is reasonable to interpret a general contractual cost provision by reference to an established statutory definition of costs, we do not discern any legislative intent to prevent sophisticated parties from freely choosing a broader standard authorizing recovery of reasonable litigation charges and expenses.” (*Id.* at p. 492; see *Davis v. KGO-TV, Inc.* (1998) 17 Cal.4th 436, 446-447, fn. 5 [the effect of a contractual agreement for shifting litigation costs turns on the intentions of the parties].)

Plaintiff urges us to follow *Arntz*, and to construe the Agreement here as providing a standard of “costs” broader than the statutory definition. But the costs award is insupportable even if we were to do as plaintiff urges. Recovery of costs provided by contract must be specially pleaded and proven at trial, and not awarded posttrial as was done here. (*Arntz, supra*, at p. 491; *First Nationwide Bank v. Mountain Cascade, Inc.* (2000) 77 Cal.App.4th 871, 878-879.) “[T]he proper interpretation of a contractual agreement for shifting litigation costs is a question of fact that ‘turns upon the intentions of the contracting parties.’ ” (*First Nationwide Bank, supra*, at p. 879.) Accordingly, “the issue must be submitted to the trier of fact for resolution pursuant to a prejudgment evidentiary proceeding, not a summary postjudgment motion.” (*Ibid.*)

Nor may the disputed costs be awarded to plaintiff as an element of attorney fees under the rationale that the expenses were disbursed by the attorneys in the course of litigation. We disavow this court’s previous adoption of that view as an unwarranted conflation of fees and costs. (*Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1167.) As persuasively argued by our colleagues in the Third District in disagreeing with *Bussey*: “In the absence of some specific provision of law otherwise, attorney fees and the expenses of litigation, whether termed costs, disbursements, outlays, or something else, are mutually exclusive, that is, attorney fees do not include such costs and costs do not include attorney fees.” (*Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1626.) We join other Divisions of this District in following *Ripley* on this point. (*First*

Nationwide Bank v. Mountain Cascade, Inc., *supra*, 77 Cal.App.4th at p. 878; *Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1154.)

Defendants also argue that \$1,530.91 spent by plaintiff to expedite preparation of deposition transcripts is not recoverable as an item of costs. Standard transcription fees for “necessary” depositions are recoverable, but the extra cost for expediting transcripts may be allowed only in the exercise of the trial court’s discretion. (Code Civ. Proc., § 1033.5, subds. (a)(3), (c)(4).) Plaintiff maintains that the trial court either found the extra deposition fees to be necessary or exercised its discretion in allowing recovery of these extra fees. Plaintiff notes that the court commented, at the hearing on costs: “I am not satisfied that [the expedited transcripts] are merely convenient.” However, the court also said that the requested expedited deposition costs are “not allowed under the code section,” and proceeded to award the costs under the parties’ contract which, in the court’s view, provided a more expansive definition of costs. The court erred in awarding costs not authorized by statute. We will therefore modify the judgment to strike the recovery of expert witness fees, general photocopying costs, and expedited deposition transcript fees, thus reducing the costs award by \$70,996.99.

F. Cross-Appeal: Punitive Damages.

1. The punitive damages claim and motions relating to the claim.

Plaintiff Hsu sought punitive damages under several causes of action in this case initiated in October 1996. (Civ. Code, § 3294.) Discovery closed in April 1998. During discovery, defendants had asserted the attorney-client privilege in refusing disclosure of their communications with legal counsel about the Agreement. In August 1998, defendants, through new counsel, informed Hsu that defendants now intended to claim reliance on the advice of counsel as a defense and offered discovery of their communications with counsel. Plaintiff rebuffed the offer, stated his opposition to renewed discovery, and maintained that defendants could not assert a defense upon which they previously prevented discovery.

Soon thereafter, defendants moved for summary adjudication of the punitive damages claim on grounds that they relied on the advice of counsel in their purchase of

Hsu's shares, and thus did not act with fraud, oppression, or malice as would warrant imposition of punitive damages. Plaintiff argued in opposition to the motion that he had been denied discovery relating to the advice of counsel defense by defendants' previous assertion of the attorney-client privilege, but plaintiff did not request a continuance to conduct additional discovery.⁸ (Code Civ. Proc., § 437c, subd. (h).) The trial court granted the motion for summary adjudication on November 12, 1998, finding that plaintiff failed to raise a triable issue of material fact disputing defendants' reliance on advice of counsel.

In November 1998, plaintiff moved in limine to exclude defendants' advice of counsel evidence on the ground that defendants prevented its discovery by assertion of the attorney-client privilege. The advice of counsel defense was proffered at trial to refute Hsu's fraud cause of action.⁹ In September 1999, the court denied the motion to exclude the evidence, but gave Hsu an opportunity to conduct additional discovery on the matter. Hsu did so and, in September 2000, moved for leave to amend his complaint to reinstate his punitive damages claim. Hsu argued that the additional discovery uncovered evidence "which strongly suggest[s] that defendants did not reasonably rely on advice of counsel." Hsu conceded that his motion was outside the scope of a statutory motion for reconsideration, and said the circumstances presented the "unique situation" of a change in facts warranting a revised ruling. The trial judge referred the motion to the judge who had earlier granted defendants' motion for summary adjudication dismissing the punitive damages claim.

In October 2000, the court heard and denied plaintiff's motion to reinstate his punitive damages claim. The court found that it did not have jurisdiction because the

⁸ Plaintiff was opposed to additional discovery, and had successfully defeated defendants' recent motion to reopen discovery.

⁹ The common law fraud cause of action never reached the jury. Plaintiff dismissed the fraud cause of action against the nonmanagement defendants during trial, and the trial court subsequently granted the three management defendants' motion for nonsuit on the cause of action on grounds unrelated to the advice of counsel defense.

motion failed to satisfy statutory standards for reconsideration. (Code Civ. Proc., § 1008.) The court also declined to exercise any inherent power to reevaluate its summary adjudication order because plaintiff refused defendants' August 1998 offer of discovery, and did not ask for a continuance to pursue discovery at the time the motion was pending.

Trial proceeded without Hsu's punitive damages claim. The jury found in favor of Hsu on all causes of action submitted to it, and awarded Hsu compensatory damages. Following entry of judgment, Hsu moved for a new trial limited to punitive damages. (Code Civ. Proc., § 657.) Hsu repeated his earlier assertion that supplemental discovery found "evidence refuting, or at least establishing a genuine issue of material fact, whether defendants reasonably relied on the advice of their counsel in the acts that comprise this lawsuit." The court denied plaintiff's motion for new trial.

2. Summary adjudication was proper.

Plaintiff concedes on appeal that he "lacked evidence to rebut [defendants'] assertion of good faith reliance" made in their motion for summary adjudication. Nevertheless, plaintiff argues that defendants' motion for summary adjudication should have been denied because he was prevented access to discovery by defendants' privilege claim. But plaintiff's remedy for being denied access to essential facts was to move for a continuance to obtain necessary discovery. (Code Civ. Proc., § 437c, subd. (h).) Plaintiff chose, instead, to stand on the state of the evidence. That evidence compelled a ruling against him.

3. The motion to reinstate the punitive damages claim was properly denied.

Plaintiff mischaracterizes his motion to reinstate his punitive damages claim as a motion to amend his complaint. In fact, plaintiff sought a reversal of the court's prior summary adjudication ruling. The courts are currently divided on the question of whether a trial court has jurisdiction to reconsider and change a prior ruling beyond the power granted and circumscribed by statute. (Code Civ. Proc., § 1008.) Some courts

have held that the statutory standards for reconsideration are jurisdictional and exclusive. (E.g. *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 685-691.) Other intermediate appellate courts have held that a trial court has inherent constitutional power to reconsider a prior ruling on its own motion. (E.g. *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 391.) Still other courts have held that a trial court has inherent power to reconsider and modify a prior ruling, whether on its own motion or that of a party. (E.g. *Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 210.)

We need not choose among these competing views on the power of a trial court to reconsider its prior rulings. Here, the trial court denied plaintiff's motion whether stated under statute or any inherent power to reverse prior rulings. (Code Civ. Proc., § 1008.) As plaintiff Hsu rightly conceded in the trial court, his motion was outside the scope of a statutory motion for reconsideration. A glaring deficiency is the motion's untimeliness, as it came not within ten days of notice of the order, but almost two years later. (Code Civ. Proc., § 1008, subd. (a).) Assuming the court had authority beyond the statute to reconsider and change its ruling, the court did not abuse its discretion in denying the motion. As the trial court observed, plaintiff could have sought a continuance of the summary adjudication hearing to obtain additional discovery. (Code Civ. Proc., § 437c, subd. (h).) His failure to do so evinces a lack of diligence and undermines his claim that he was wrongly denied necessary discovery.

4. The motion for new trial was properly denied.

Plaintiff Hsu's new trial motion was unusual. As plaintiff states on appeal, "the limited trial that Hsu requested did not require granting a new trial. Hsu had been denied any trial at all on punitive damages. Granting Hsu's motion thus did not involve setting aside a jury verdict." (*Italics omitted.*) In fact, it appears that Hsu's motion is better characterized as yet another motion for reconsideration of the summary adjudication dismissing his punitive damages claim, rather than a motion for new trial. However characterized, the court properly denied the motion.

Plaintiff's motion was founded on the assertion that he had been denied relevant discovery. Plaintiff repeats on appeal that defendants "misuse[d]" the attorney-client privilege to foreclose discovery until the eve of trial. But the trial court never found a misuse of discovery. The court simply found that defendants had to disclose evidence upon which they intended to rely, and thus permitted supplemental discovery after defendants shifted litigation strategy. It was on this basis that the trial court granted plaintiff supplemental discovery. The court expressly stated, while permitting additional discovery, that it had not found any abuse of discovery by defendant. Moreover, the evidence that plaintiff proffers as newly discovered evidence could have been discovered sooner, at the time of the motion for summary adjudication, had plaintiff requested a continuance to pursue evidence on the advice of counsel defense. The record does not support plaintiff's assertions of a misuse of discovery, surprise, or newly discovered evidence warranting a new trial.

IV. DISPOSITION

The judgment is modified to strike the finding that defendant SSI violated Corporations Code section 25401 and to reduce the costs award to \$65,827.99. As modified, the judgment is affirmed. The parties shall bear their own costs and attorney fees incurred on the appeal and cross-appeal.

Sepulveda, J.

We concur:

Kay, P.J.

Rivera, J.

Trial Court:	Alameda County Superior Court.
Trial Judge:	Honorable Joseph Carson.
Counsel for Plaintiffs and Appellants:	Gray Cary Ware & Freidenrich, Richard I. Yankwich, Stanley J. Panikowski, Barry D. Roe, Andrew P. Valentine, Kathryn E. Karcher.
Counsel for Defendants and Appellants:	Folger Levin & Kahn LLP, Michael A. Kahn, Roger B. Mead, Michael F. Kelleher, Andrew J. Davis.